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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THOMAS LEE, Plaintiff and Respondent, v. TONY ING, Defendant and Appellant.	B288968 (Los Angeles County Super. Ct. No. KC062546)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dan Thomas Oki, Judge. Affirmed.

Law Office of Phillip Hwang and Phillip S. Hwang for Defendant and Appellant.

Wong & Mak and Fred A. Wong for Plaintiff and Respondent.

INTRODUCTION

Thomas Lee sued Tony Ing, alleging that Ing fraudulently induced Lee to give him $1 million. Lee claimed that Ing agreed to invest the money on Lee's behalf but instead spent it himself. Following a court trial, the court entered judgment in favor of Lee. We affirmed. Ing then moved the trial court to set aside the judgment on the grounds of extrinsic fraud. He contended that during the trial, his attorney stipulated to certain facts without Ing's knowledge or authorization, and that the stipulation undercut Ing's credibility and resulted in the judgment against him. The trial court denied the motion, as well as Ing's subsequent motion for reconsideration. Ing now appeals a second time.

The parties dispute whether Ing's appeal is timely. We conclude that it is. Substantively, we find no error and affirm the trial court's orders.

FACTUAL AND PROCEDURAL HISTORY

I. *Underlying Case*

We take the following factual summary from our prior unpublished opinion, *Lee v. Ing* (Feb. 5, 2015, B253965) (nonpub. opn.).

Ing is a leader of a church, the Seventh Day Church of Christ. Lee was introduced to Ing in late 2007 and began attending his church. In May 2008, Ing convinced Lee to invest $1 million in currency trading. He represented that Lee could make an annual profit of 20 to 30 percent, part of which he could donate to the church. Lee gave Ing a signed check, which Ing filled out. Ing made the check out to his investment company, Hypo Capital Markets, and wrote "investment(s)" on the memo line. During the following year, Ing gave Lee assurances that the

investment was profitable, but refused Lee's requests for an account statement or payment of any returns.

During the same period, Ing and Lee were involved in another business venture. Ing agreed to help Lee take control of the Maximum Surgery Center (Maximum), negotiating a buy-out of another owner and ultimately resulting in the transfer of stock ownership of Maximum to another church member. Maximum shut down in 2011.

Several months before Maximum shut down, Lee asked Ing to return a portion of his investment in currency trading, so that he could pay off loans and leases he had signed on behalf of Maximum. Ing promised to wire the money, but did not. He had not invested the $1 million in currency trading; instead, he had donated $540,000 of it to the church to buy a property in Rowland Heights, and spent the rest on personal expenses.

In November 2011, Lee sued Ing for breach of oral contract, fraud, conversion, common counts, civil conspiracy, and constructive trust, based on his failure to invest in currency trading. Ing cross-complained for breach of oral agreement, alleging that Lee had agreed to compensate him for his services during the buy-out and subsequent management of the medical center. During the bench trial, Lee dismissed the civil conspiracy claim.

Ing's position at trial was that the $1 million check to Hypo Capital Markets represented Lee's investment in the buy-out of Maximum, and that Lee agreed to compensate Ing for his services in whatever amount was left over after the buy-out negotiations. Accordingly, Ing claimed he was entitled to receive the entire $1 million. Lee testified he did not authorize Ing to

offer $1 million for the buy-out and did not agree to compensate Ing in that amount.

The trial court found that Ing was not credible, that he had breached the agreement to invest the $1 million in currency trading, and that he had made misrepresentations and concealed material facts to induce the investment. The court found Lee did not obtain full control of Maximum and there existed no enforceable agreement to compensate Ing for his services with respect to the center. Judgment was entered against Ing in the amount of $1,808,556.67. A constructive trust was placed on the church property.

Ing appealed from the judgment, arguing that Lee's complaint was time-barred and his recovery was barred by the doctrine of unclean hands. We affirmed the judgment in 2015. Ing filed a petition for review with the California Supreme Court and then a Writ of Certiorari with the United States Supreme Court, both of which were denied.

II. *The Stipulation*

The stipulation at issue in this appeal was presented to the court on the first day of trial in July 2013. The attorneys for both parties made their appearances and introduced Lee and Ing, who were present in court. A few moments later, Lee's counsel told the court that Ing's counsel, Ramon Barredo, had "proposed a stipulation of fact that actually is going to speed things a lot [*sic*], quite a bit. And we both signed off." Barredo then read the stipulation into the record: "No. 1, the total amount of money given by the plaintiff Thomas Lee to Tony Ing was not invested by Tony Ing or Thomas Lee. And no. 2, the amount of money given by Thomas Lee to Tony Ing were [*sic*] all spent by Tony Ing

for his own personal purposes not for the benefit of Thomas Lee." Lee's counsel indicated his agreement with the stipulation.

III. ***Motion to Set Aside Judgment***

In September 2017, Ing filed a motion to set aside the judgment "on equitable grounds of extrinsic fraud." He argued that Barredo had entered into the stipulation "without Ing's knowledge or authorization" and the stipulation contradicted Ing's testimony and "amount[ed] to a confession on the merits." Ing submitted a declaration in support of his motion, in which he stated that the stipulation was submitted to the court without his knowledge or consent, and that he was not present in the courtroom at the time. He also claimed that he first learned of the contents of the stipulation from Barredo in March 2016. He sued Barredo, Lee, Lee's attorney, and others for fraud and other claims in May 2016. Barredo also submitted a declaration, stating that he was "induced" by Lee's counsel to enter into the stipulation and he had "no recollection of ever receiving my client's consent to enter into the stipulation." Barredo's declaration did not address Ing's claims that the stipulation was factually false and contradicted the evidence the defense intended to present at trial.

Lee opposed the motion, arguing that the stipulation could not serve as a basis for a finding of extrinsic fraud, as it did not contradict Ing's position at trial. Lee also contended that Ing's motion was untimely, as it was filed more than a year after Ing filed the lawsuit against Barredo based on the same claims regarding the stipulation. In reply, Ing reasserted that the stipulation "concede[d] everything in favor of Lee" and Ing had "testified contrary to the stipulation" without any knowledge of its existence, serving to "impeach his testimony and destroy his

credibility in the eyes of the court." Ing also claimed that he "promptly" filed his motion once he discovered the purported fraud.

Following a hearing on October 31, 2017, the court denied Ing's motion.[1] The court found that Ing "failed to overcome the high burden of establishing extrinsic fraud; and extraordinary relief in this matter is not warranted." The court noted that Ing had fully participated in the trial and failed to provide any evidence to support his claim that the stipulation contradicted his testimony or the testimony of his other trial witnesses. In fact, relying on the trial court's statement of decision, the court found that Ing had testified at trial that the $1 million payment at issue was "a gift or compensation for his business services and that Lee owes him additional monies for other business services he rendered relating to the surgical center." As such, "Ing's testimony and position at trial [was] therefore consistent with the stipulation" and Ing was not "fraudulently prevented from presenting his claim or defense." The court also found no evidence of any fraud on the court or Ing, as Barredo's declaration did not state that the stipulation contained any falsehoods and Barredo, at most, admitted he had "no recollection of ever receiving" Ing's consent to the stipulation.

In addition, the court concluded that Ing had not demonstrated that he had a meritorious defense that was not or could not have been presented at trial. The court found that "[e]ven if Ing had testified to making investments for Lee's benefit (which he has not shown), the trial court's statement of

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[1]The judge who heard Ing's motions to set aside the judgment and for reconsideration was not the judge who presided over the 2013 trial.

decision was based on other evidence in the record," including the fact that the $1 million check was marked "Investment(s)" on the memo line and the court's disbelief of Ing's claim that he was entitled to a total of $1,780,000 for his "services." Finally, the court found that Ing had not diligently sought relief, noting that Ing failed to explain why he waited over 18 months after purportedly discovering the stipulation to file his motion. Lee served a notice of ruling on Ing on November 1, 2017, stating that the court had denied the motion.

Ing filed a motion for reconsideration in November 2017. He included excerpts of trial transcripts, arguing that the transcripts supported his assertion that the stipulation contradicted his testimony. In his accompanying declaration, Ing summarized his testimony in the attached trial transcripts as follows: (1) he donated $540,000 of the $1 million he received from Lee to the church; that money was used to "acquire property in Rowland Heights used for church purposes"; (2) he used $300,000 for "expenses in acquiring a contract for patients" related to Maximum; (3) he used $92,512 to help Lee purchase real property in Diamond Bar, California; and (4) the remaining money was used "to pay for the administrative work of myself and my wife for the benefit of" Maximum. Ing also submitted a second declaration from Barredo, stating that he was "financially influenced" to submit the stipulation "behind my client's back."

Ing filed an amended motion for reconsideration in December 2017. In January 2018, he submitted a supplemental declaration with excerpts from a deposition given by Lee in

another action.[2] Ing contended the testimony showed that the stipulation was also entered without Lee's knowledge or consent.

Lee opposed the motion for reconsideration, arguing that Ing had not demonstrated any new facts that he could not have included with his initial motion to set aside the judgment. Ing filed a reply. He contended that before he saw the court's decision denying his motion to set aside the judgment, in which the court noted the absence of trial transcripts supporting Ing's argument, "[t]here was no way for Ing to anticipate and foresee that the court would raise the issue of records."

The court heard argument on Ing's motion for reconsideration on March 13, 2018, and denied the motion. The court found that the motion was "based on evidence that could have been presented in connection with the original motion," including the trial testimony from 2013 and Barredo's second declaration, dated October 21, 2017, ten days before the hearing on Ing's initial motion to set aside the judgment. Additionally, the court held that even if it were to "consider Ing's 'new facts,' the outcome of the motion would be the same." The court noted that the excerpts of trial testimony submitted by Ing were consistent with the stipulation, as Ing testified at trial that "the money belonged to him and was not for the purpose of an investment on behalf of Lee."

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[2]The court ultimately refused to consider either the amended motion or the supplemental declaration, finding that both were untimely under Code of Civil Procedure section 1008, subdivision (a).

Ing filed his notice of appeal on March 20, 2018.

DISCUSSION

The parties raise two issues on appeal. First, Lee asserts that the court lacks jurisdiction to hear Ing's appeal and/or the appeal is untimely. Second, Ing argues the trial court erred in denying his motions to set aside the judgment and for reconsideration. We reject both contentions and affirm.

I. *Scope and Timeliness of the Appeal*

A. *Background*

At issue is whether Ing appealed from *both* the court's October 2017 order denying Ing's motion to set aside the judgment *and* the March 2018 order denying his motion for reconsideration, or only the latter. Ing filed his notice of appeal on March 20, 2018. The notice form provides a space for the appellant to list the date of entry of the judgment or order being appealed, and then a series of checkboxes for the appellant to identify the type of order at issue. Here, Ing left the date portion blank and checked the box indicating that he was appealing from "[a]n order after judgment under Code of Civil Procedure, § 904.1(a)(2)." In his notice designating the record on appeal, Ing listed March 13, 2018 (the date of the order denying reconsideration) as the date of the order he was appealing.

On April 11, 2018, we sent appellant a default notice for failing to file a case information statement on appeal. Ing submitted a case information statement; in the section entitled "Timeliness of Appeal," he listed the date of "entry of judgment or order appealed from" as March 13, 2018. However, he failed to attach a copy of the judgment or order being appealed, and his case information statement was therefore rejected. Ing resubmitted his case information statement on April 18, 2018,

again listing March 13, 2018 as the relevant date. This time, however, he attached the court's tentative rulings issued on October 31, 2017 and March 13, 2018.[3]

On April 24, 2018, we issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction. In his response, Ing asserted that he was appealing both orders under Code of Civil Procedure section 904.1, subdivision (a)(2).[4] Lee filed a response, and Ing responded. Ing also filed an amended civil case information statement, changing the applicable date of the order appealed from to October 31, 2017.

On June 25, 2018, we discharged the order to show cause and deferred the ruling on the timeliness of the appeal to the panel. We address that issue now.

B. *Analysis*

First, Lee contends that Ing appealed only from the March 2018 order denying the motion for reconsideration. That order, alone, is not directly appealable; thus, this court would lack jurisdiction over the appeal. (§ 1008, subd. (g).) Ing argues that he intended to appeal from both the March 2018 order and the earlier October 2017 order denying his motion to set aside the judgment. He points to the ambiguity in the notice of appeal, together with the later documents he filed listing both orders, and asks that we construe the notice of appeal in his favor.

Our jurisdiction "is limited in scope to the notice of appeal and the judgment appealed from." (*Dakota Payphone, LLC v.*

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[3]Ing contends he was not able to obtain a copy of the court's minute orders adopting the two tentative rulings as final until May 23, 2018.

[4]All further statutory references are to the Code of Civil Procedure unless stated otherwise.

Alcaraz (2011) 192 Cal.App.4th 493, 504.) However, "notices of appeal will be liberally construed to implement the strong public policy favoring the hearing of appeals on the merits. [Citation.] This policy is especially vital where the faulty notice of appeal engenders no prejudice and causes no confusion concerning the scope of the appeal." (*Norco Delivery Service, Inc. v. Owens Corning Fiberglas* (1998) 64 Cal.App.4th 955, 960–961.)

Ing's notice of appeal failed to clearly identify the order or orders he was appealing. Although his initial case information sheet identified only the March 2018 order, Ing's subsequent filings and responses to the court's order to show cause made clear that he intended to appeal from both the October 2017 and March 2018 order. As such, by May 2018, and certainly long before Ing filed his opening brief in February 2019, there could be little confusion concerning the intended scope of the appeal. Lee has identified no prejudice or confusion resulting from Ing's faulty notice of appeal. Accordingly, we construe Ing's notice of appeal as an appeal from both the October 2017 order denying his motion to set aside the judgment and the March 2018 order denying reconsideration. If timely, the former order is directly appealable (§ 904.1, subd. (a)(2)), and the latter may be considered as part of that appeal (§ 1008, subd. (g)).

Second, Lee argues that an appeal from the October 2017 order would be untimely. He points to the notice of ruling that he served on Ing on November 1, 2017. Ing counters that this notice did not trigger the time for him to appeal, as it was not the notice required under California Rules of Court, rule 8.104(a)(1)(B).

"Compliance with the time for filing a notice of appeal is mandatory and jurisdictional. [Citation.] If a notice of appeal is not timely, the appellate court must dismiss the appeal."

(*Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 582; see also California Rules of Court, rule 8.104, subd. (b) ["[N]o court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal."].) California Rules of Court, rule 8.104(a)(1), contains the applicable time period for filing a notice of appeal. It provides that a notice of appeal must be filed "on or before the earliest of . . . (B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or (C) 180 days after entry of judgment." For purposes of these deadlines, the word "'judgment' includes an appealable order if the appeal is from an appealable order." (Cal. Rules of Court, rule 8.104(e).)

Here, Ing was not served with either a document entitled "Notice of Entry" of the appealable order (the minute order denying his motion to set aside the judgment) or a file-stamped copy of that order. Lee's suggestion that the "Notice of Ruling" he served was equivalent to these documents is not supported by authority. (See *Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 399 ["[S]erving a notice of ruling is not the same as serving a copy of the order or a notice of entry of the order, as contemplated by the rules governing the timeliness of appeals."]; *Insyst, Ltd. v. Applied Materials, Inc.* (2009) 170 Cal.App.4th 1129 [holding that email notice to the parties that judgment had been electronically filed was insufficient, as it did not include a Notice of Entry of Judgment or a file-stamped copy of the judgment].) As such, Ing's time to appeal is governed by rule 8.104(a)(1)(C). Because Ing filed the instant appeal within 180 days after entry of the October 2017 order, his appeal was timely.

II. *Court Orders Denying Ing's Motions*

A. *Motion to set aside judgment*

Ing argues, as he did below, that the judgment against him was procured by extrinsic fraud, which prevented him from fairly presenting his case. The trial court disagreed, and we see no error in that conclusion.

"After the time for seeking a new trial has expired and any appeals have been exhausted, a final judgment may not be directly attacked and set aside on the ground that evidence has been suppressed, concealed, or falsified; in the language of the cases, such fraud is 'intrinsic' rather than 'extrinsic.'" (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 10.) "To allow a litigant to attack the integrity of evidence after the proceedings have concluded, except in the most narrowly circumscribed situations, such as extrinsic fraud, would impermissibly burden, if not inundate, our justice system." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 214; see also *Kachig v. Boothe* (1971) 22 Cal.App.3d 626, 641 (*Kachig*).)

However, a trial court retains the inherent power to vacate a judgment or order on equitable grounds where a party establishes that the judgment or order resulted from extrinsic fraud. (See *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1228 (*Gorham*).) "Extrinsic fraud occurs when a party is deprived of the opportunity to present a claim or defense to the court as a result of being kept in ignorance or in some other manner being fraudulently prevented by the opposing party from fully participating in the proceeding. (*Id*. at pp. 1228-1229, citing *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 26–27; see also *Kachig, supra*, 22 Cal.App.3d at p. 632.)

"Such relief will be denied, however, where it appears that the complaining party '. . . has had an opportunity to present his case to the court and to protect himself from . . . any fraud attempted by his adversary.' [Citations.] This rule is based upon the . . . important public policy that there must be an end to litigation which underlies the doctrine of finality of judgments." (*Kachig, supra*, 22 Cal.App.3d at p. 632.) Because of this strong public policy in favor of the finality of judgments, equitable relief from a judgment is available "only in exceptional circumstances." (*Gorham, supra,* 186 Cal.App.4th at pp. 1229-1230, citing *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982.)

We review the court's denial of a motion for equitable relief to set aside a judgment for an abuse of discretion, determining whether that decision exceeded the bounds of reason in light of the circumstances before the court. (*Gorham, supra,* 186 Cal.App.4th at p. 1230.)

Here, the trial court did not abuse its discretion in finding that Ing had not established that he was entitled to equitable relief. The trial court found that Ing had not been prevented from presenting his case at trial. Ing argues that he was effectively barred from any meaningful participation because the trial court relied on the stipulation and disregarded Ing's testimony. We find no evidence in the record to support this assertion. Ing was allowed to present extensive evidence at trial in support of his defense and cross-claims; notably, he testified at length over the course of several days. The trial court issued a lengthy statement of decision, detailing the evidence in support of its conclusions on each issue. Thus, there is no support for Ing's

claim that the court "behaved like [it] was enormously influenced" by the stipulation.[5]

Further, we reject Ing's contention that the stipulation admitted facts that contradicted his own testimony. As the trial court noted in its statement of decision, the central issue at trial was whether the $1 million payment from Lee to Ing was "investment, gift, or earned income." Ing contended at trial that the money was "a gift or compensation for his business services." Indeed, Ing testified repeatedly at trial that the payment was his compensation for helping Lee acquire control of Maximum. This testimony did not conflict with the premise of the stipulation—that Ing did not invest the funds on Lee's behalf. Ing contends that the language in the stipulation regarding his "personal use" of the funds contradicted his testimony that some of the money went to purchases that ultimately benefited Lee, including "improvements at the church where Lee was worshipping, . . . helping Lee buy real estate, . . . [and] paying for equipment and staff" at Maximum. There is no evidence that the trial court treated the stipulation as foreclosing Ing's claim that he used some of the money for non-investment purposes that benefited Lee and the church. Instead, the court found extensive evidence supporting its conclusion that Ing induced Lee to give him $1 million by promising to make investments on Lee's behalf, but that Ing failed to make any such investments and claimed the

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[5]We also reject Ing's contention that the court acted improperly by disbelieving portions of Barredo's declaration. In the declaration, Barredo stated in one paragraph that Ing did not consent to the stipulation and in another that he did not recall Ing giving consent. The court was within its discretion to disregard portions of the declaration that it found lacking in credibility and consistency with the other evidence in the case.

money was owed to him as payment for his services. Those findings were affirmed on appeal and we will not disturb them.

Moreover, Ing has shown no error in the court's conclusion that he failed to act diligently in seeking equitable relief. (See *Lee v. An* (2008) 168 Cal. App. 4th 558, 566.) The stipulation was discussed at least twice in Ing's presence during the trial. The record reflects that Ing was in the courtroom when the stipulation was discussed and read into the record by his attorney. The stipulation was also discussed while Ing was on the witness stand. During cross-examination by Lee's counsel, Barredo objected that questions regarding a series of checks was "probably irrelevant because of the stipulation that you mentioned at the beginning saying that the $1 million that was given to Mr. Ing was spent for his personal purposes not for investment." The court overruled the objection, noting that the parties had not stipulated to liability as to any cause of action. In addition, the court's statement of decision, filed November 27, 2013, specifically referred to the stipulation. Ing, through Barredo, filed objections to the statement of decision in December 2013; these objections did not raise the stipulation as an issue. Ing contends that Barredo told him the contents of the stipulation in mid-2016, at which time Ing sued Barredo and others in a separate action. Ing has offered no justification for waiting until September 2017, more than a year after he purportedly learned of the issue and more than four years after the trial, to bring his motion to set aside the judgment.

As such, we conclude the court did not err in denying Ing's motion to set aside the judgement.

B. *Motion for reconsideration*

Ing also asserts that the trial court erred in denying his motion for reconsideration. We are not persuaded.

Section 1008, subdivision (a) allows a party to move for reconsideration of an order "based upon new or different facts, circumstances, or law." "'According to the plain language of the statute, a court acts in excess of jurisdiction when it grants a motion to reconsider that is not based upon "new or different facts, circumstances, or law."'" (*Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 670.) Moreover, "[t]he party seeking reconsideration must provide not just new evidence or different facts, but a satisfactory explanation for the failure to produce it at an earlier time." (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.) We review the trial court's ruling on a motion for reconsideration for an abuse of discretion. (*Ibid.*)

Ing asserts that his 2013 trial testimony constitutes "new evidence," which he could not have produced in support of his earlier motion to set aside the judgment, because he did not know the court wanted to review the testimony until it denied his motion. He cites no authority in support of this proposition. Ing was aware of his prior testimony at trial at the time he brought his motion to set aside the judgment; indeed, his central argument in that motion was that the stipulation conflicted with and undermined his testimony. His failure to include the evidence potentially supporting this argument does not create a basis for him, in hindsight, to claim that he could not have known its importance or that the evidence is somehow "new" or "different." In essence, Ing argues that a party would have a basis for reconsideration any time a court details the ways in which the party failed to meet its evidentiary burden. This

contention is meritless. (See *Hennigan v. White* (2011) 199 Cal.App.4th 395, 406.)

The trial court therefore did not abuse its discretion in denying Ing's motion for reconsideration on the basis that the testimony offered by Ing did not constitute "'new or different facts'" for purposes of granting reconsideration. (§ 1008, subd. (a); *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 688, 690.)

DISPOSITION

Affirmed. Lee is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.